

U.S. Small Business Administration

**Avoiding a Size Protest** 

# Host



# Host/Presenter Information

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## **Topics Covered**

- UNDERSTAND YOUR SIZE STATUS
  - Size
    - Size standards/NAICS Codes
    - Nonmanufacturer Rule (NMR)
  - Affiliation
    - Types of affiliation
    - Joint Ventures
    - Ostensible subcontracting
    - Mentor-Protégé programs
- SIZE PROTEST TRIGGERS



## What is a Small Business?

- 1. Organized for profit
- 2. Place of business in the U.S. that operates primarily in the U.S. or makes a significant contribution to the U.S. economy
- 3. Each NAICS has a receipts-based OR employee-based small business size standard



## **SBA Size Standards**



236220	Commercial and Institutional Building Construction	\$39.5
541310	Architectural Services	\$8.0
541320	Landscape Architectural Services	\$8.0
541412	Computer Systems Design Services	\$30.0
562910	Environmental Consulting Services	\$16.5
332322	Sheet Metal Work Manufacturing	500
541715	R&D in Physical, Engineering & Life Sciences	1000
	Aircraft, Aircraft Engine, and Engine Parts	1500

www.sba.gov/tools/size-standards-tool



## **Average Annual Receipts (AAR)**

- Use Federal Tax Returns (not financial documents)
- "Cost of Goods Sold" plus "Total Income"
- □ Average of last three (or five) <u>completed</u> fiscal years

## **Number of Employees**

- □ Count all individuals employed on a full-time, part-time, or other basis.
- □ Numbers of employees for each of the pay periods for the <u>preceding, completed</u> 12 calendar months.

### **Few Exclusions-** - 13 CFR § 121.104(a)

proceeds from transactions between a concern and its affiliates



## As of What Moment is Size Determined?

On the date the offeror submits its written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price.

13 CFR §121.404(a)

#### <u>Multiple Award Contracts</u> –

- small at the time of offer for the MAC,
- small for each order issued against the contract,
- unless a contracting officer requests a new size certification in connection with a specific order



13 CFR 121.404(a)(1)

## Can a firm's size change during performance?

Small for the life of that contract (including options) unless recertification is requested/required.

13 CFR §121.404(g)

#### **Recertification required:**

- Novation
- Merger/Acquisition
- Contract with duration over 5 years (recertify before the end of the fifth year and every time an option is exercised thereafter) 13 CFR §121.404(g)



## **Manufacturing Contracts**

- On a small business set-aside contract, the offeror must be the Manufacturer or meet the requirements of the NonManufacturer Rule
- Not applicable to small business set-asides between the MPT and the Simplified Acquisition Threshold (SAT)
  - IS APPLICABLE TO SBSAs over the SAT
  - IS APPLICABLE TO SOCIO-ECONOMIC SBSAs of any dollar level
- Applies to orders off GSA Schedule if they are set-aside for small business
- Has to be self-performed by the offeror themselves (not an affiliate)

13 CFR § 121.406



## Non-Manufacturer Rule (NMR)

If a procurement is set-aside for small business and has been assigned a manufacturing or supply NAICS code, the small business offeror <u>must:</u>

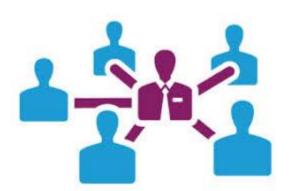
- (i) have less than 500 employees;
- (ii) be primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied;
- (iii) take ownership or possession of the item(s) with its personnel,
   equipment or facilities in a manner consistent with industry practice; and
- ▶ (iv) supply the end item of a small business manufacturer made in the United States **OR** obtain a waiver of such requirement...

Waivers (waive subsection (iv) <u>only</u>) may be either class or individual and must be in place before receipt of offers. See procedures in 13 CFR §121.1204. Class waivers publicized on SBA's website. Individual waivers must be announced in solicitation.

13 CFR §121.406(b)(1)



## **AFFILIATION**

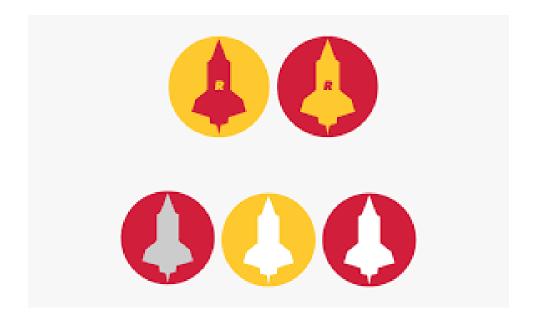




## **Two Types of Affiliation**

#### General

On-going basis



#### For a Specific Procurement

- Joint venture
  - Affiliated only for the contract at hand

## **AFFILIATION**

#### THE KEY TO SIZE IS AFFILIATION

A concern's size always includes the size of all of its domestic and foreign affiliates.

13 CFR §121.103(a)(6)

#### THE KEY TO AFFILIATION IS CONTROL

"Concerns are affiliated...if one concern **controls or has the power to control** the other, or a third party has the power to control both."

13 CFR §121.103(a)(1); FAR §19.101



## **Affiliation Factors**

#### **GENERAL**

- Common ownership
- Common management
- Identity of Interest (family members, pattern of common investments, dependence through contractual relationships)
- Newly Organized Concern

#### **CONTRACT SPECIFIC**

■ Joint Ventures/Teaming



# Is a Teaming Agreement a Joint Venture or a Prime/Subcontractor Relationship?

Can be either



## Prime / Subcontractor Relationship

A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract





## Joint Ventures (JV)



- JV must be in writing and registered in SAM
- Organized for a specific and limited purpose
- Each joint venture member must qualify as small for the NAICS code assigned to the procurement

SB1 (\$7 million) + SB2 (\$4 million) Size Standard \$10 million

13 CFR § 121.103(h)



## 8(a) Mentor-Protégé JVs

A joint venture formed by an SBA-approved mentor and 8(a) protégé (per §124.520) may bid on a federal procurement as a small business concern if the protégé is small....

13 CFR §121.103(h)(3)(iii)

#### **SBA must:**

- ✓ approve both mentor-protégé <u>and</u> JV Agreements (on 8a set-asides 13 CFR 124.513(c)).
- ✓ written SBA approval of M/P Agreement must be given before offer
- ✓ written SBA approval of JV Agreement must be given before award



## "All Small" Mentor-Protégé JVs

A joint venture submitted by an SBA-approved mentor and protégé may bid on a federal procurement as a SBC **if** the protégé is small....

13 CFR §121.103(h)(3)(ii)

#### SBA must:

✓ Approve the M/P agreement before offer

While SBA does not review the JV Agreement, it must still meet the requirements of a Joint Venture Agreement and will be evaluated if there is a size protest. 13 CFR 125.9(e)



## Ostensible Subcontracting

A subcontractor is an ostensible subcontractor if:

- ☐ The subcontractor performs the primary and vital requirements, or
- ☐ The prime contractor is unduly reliant upon the subcontractor.

Treated as a Joint Venture



## **SIZE PROTESTS**



## Who can submit a size protest?

#### **Small business Set-aside or Unrestricted Contract:**

- Another offeror
- the Contracting Officer
- the SBA Area Director
  <u>Competitive 8(a) Set-Aside Contract</u>:

Another offeror

The Contracting Officer

Continuing 8(a) Eligibility: The SBA District Director or the AA/BD

- The 8(a) firm
- ▶ SBA AA/BD

8(a) Sole Source Contract:

The 8(a) firm

The Contracting Officer

The SBA District Director or the AA/BD

#### **SAM Registration**:

SBA Area Director



## **Timeliness, Specificity and Standing**

- CO must receive a written protest five business days after
  - (i) notification to unsuccessful offerors (RFPs/RFQs)
  - (ii) bid opening (IFBs)

13 CFR §121.1004; FAR §19.302(d)

A protest must contain "specific, detailed evidence to support the allegation that the offeror is not small."

FAR §19.302(c)(2); 13 CFR §121.1007

Protester must have standing to protest or will be dismissed
 13 CFR 121.1001



## PROTEST TRIGGERS

- Public Image
  - FPDS, FedBizOpps, USA Spending, Bloomberg \*\*
  - News Releases
  - Website (overuse of word "Affiliate")
  - Promotion of dominant customers
  - Family members in same line of business
  - Don't call your customers your affiliates
  - Don't overinflate your size/contract awards
- Size Recertification long term contracts/mergers/acq.
- GSA Schedules
- JOINT VENTURES
  - All Small MPP listed on website
  - 8(a) MPPs not on a website
  - How do they know your JV partner is your Mentor? \*\*





# QUESTIONS?



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# www.sba.gov/feedback

Thank you